CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1940

No. 331

311
20
Hon. — Jnt

Brief for Petitioners

GEORGE S. HOUSTON and HARGIS LANGDON, Trustees, Morris Wholesale Liquor Distributing Company, Inc., by HARVEY H. SMITH, Attorney in Fact, and HARVEY H. SMITH, in His Own Behalf.

Petitioners

vs.

THE HONORABLE MAC SWINFORD, Judge of the United States District Court for the Eastern District of Kentucky, and the CIRCUIT COURT OF APPEALS for the Sixth Circuit, Hon. Xen Hicks, presiding Justice and J. W. Martin, et al.

Respondents

ON CERTIORARI

HARVEY H. SMITH,
1108 Fourth National Bank Bldg., Cincinnati, Ohio
Covington, Ky.

Attorney for Petitioners

(Guarantees violated, 5th, 7th, 14th Amendments, and Art I, Section 8, Constitution of the United States'. Three Unconstitutional Statutes of Ky. imposed.)

DECISIONS - STATUTES: (INDEX)

PAGE

CODES: 1
347 (Ohlingers) Supreme Court Rules 2
Judicial Code 240 2
Judiciary Act of 1891 8
Sections 21 to 25 (Kentucky) 8
U. S. C. A. Section 780 9
Kentucky Statute 571 8
Kentucky Code 501—511 13
Rules 47 - 15 - 21 14
Rule 55 7th Amendment U. S. 17
Rule 77 Controlling Clerk 17
Kentucky Statute 112-5 17
Rule 25 Section 780 Title 28 17
Kentucky Code 511-501 43
Rule .....
Section 571 Kentucky Statute could not appear, Oliver vs. City, 161 S. W. 570
Rule 43 U. S. C. A. (Kentucky Code) evidence, must be sworn to 23
Rule 5 c U. S. C. R. (Ohlinger's Edition) 25
Findings Rule 52 28
Rule 56 C 29
Rule 77, a, b, c, (U. S.) 36
Rule 25—780 U. S. C. A. 38
Kentucky Code 511, 509, 505 47
U. S. Rules 77-501 to 511 Ky. Code 49
USC Section 236 ..... 19 and 37
Asher vs. Fordson Coal Company 249 Kentucky 498 12
Eastman Kodak Co. vs. Gray 275 U. S. 337 1
Forsyth vs. Hammond 19
Fordson Coal Company vs. Jackson 7 (2) Fed. 117 12
General Motors vs. Swann 44 Fed. (2) 24 1
Gay vs. Roff 12
Harley Co. vs. Malley 288 US 415 2
Lagnes vs. Green, 282 U. S. 531 12
Lewellyn vs. Elecric Co. 275 U. S. 243 1
Lucther vs. Moore and Knight Co. 217 US 257 2
Public Service Comsn. vs. Havemeyers 296 U. S. 506 1
Supreme Court Rule 38 sub. 10
Swift vs Panther Oil Co. 1
White vs. Mechanic Securities Corp. 269 U. S. 283 2
Warner Co. vs. Pier Co. 278 U. S. 85 .....

122632

(See the other cases on page 12 on Findings)

Martin vs. Drexel Ice Cream Company 80 Fed. (2) 768 13

Southwestern Bell Tel. Co. vs. San Antonio 75 Fed. (2) 880 and under this citation 295 US 754

Question of Right of Attorney General's necessary appearance, found at page 17.

On the question of failure to revive at page 17, rules and authorities.

On Revivor; citations at page 19—Kentucky and Federal decisions.

Suit cannot be defended or maintained when? pages 23-22: the Oliver case cited vs. City of Louisville, over-rules all cases to the contrary, found at page 22, section 571 (Ky. Statutes) Evidence must be sworn to, Rule 43 (Supreme Court Rules). Clifton vs. Toombs 21 Fed. (2) 698, at page 24, holds attorneys could not appear after default, under Rule 25, and section 780 USCA.

Intervention as a matter of Right, Rule 5 c. 25
Summons must be issued on intervention RIGHT (Ky. Code) 20 to 28; and 501 to 530 (Kentucky Code on entry of Revivor order) page 25.

Roberts vs. Lowe 236 Fed. 204, at page 32.

Revivorship in Federal and State Courts, and authorities there cited **(if not made Court loses jurisdiction)** See also at page 38, Kentucky authorities.

TRUSTEES are necessary parties in substitution, see page 39
Attorney General or Auditor must be a party, Authorities page 40
The motion for judgment at pages .....48 and 49
Franklin Circuit Court had no jurisdiction found at page 50
Decisions of the Court of Appeals.

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

The authority for the jurisdiction of this court is found in section 347 of the Supreme Court Rules, and Judicial Code, Section 240, and Paragraph 347, sub-paragraph A. (Ohlinger's Rules.)

> "The statute was intended to invest in the Supreme Court comprehensive and unlimited power. It is well established that the power of the Supreme Court to grant certiorari extends to every case pending in a circuit court of appeals. Certiorari may be granted even though the order complained of was not appealable to the Circuit Court of Appeals, and the appeal was properly dismissed by that court for want of appellate jurisdiction."
>
> Forsyth vs. Hammond, 166 U. S. 506
>
> Gay vs. Roff, 292 U. S. 25
>
> Supreme Court Rule 38, sub-paragraph 5.

In the Forsyth case the court said:

> "With reference to this clause, the power is not affective by the condition of the case, as it exists in the court of Appeals. It may be exercised before or after any decision by that court and irrespective of any ruling or determination therein."
>
> White vs. Mechanic Securities Corp., 269 U. S. 283.
>
> Lutcher vs. Moore & Knight Co., 217 U. S. 257

Judiciary Act of 1891, the Court has the power to decide the case as it was presented to the Circuit Court of Appeals.

The mandate of the court, to avoid circuity will go directly to the Circuit Court. Lutcher case, Supra.

The Court will consider the point and errors assigned by the petition. Warner Co. vs. Pier Co., 278 U. S. 85. Lagnes vs. Green, 282 U. S. 531. Public Service Comm. vs. Havemeyer, 296 U. S. 506.

The record is so extensive in this case, and covers many questions not necessary to raise here, that we have omitted these records and agreed upon only such as will present the invalidity of the order of March 4th, 1940, and the judgment of April 29, 1940. In this connection, we have not served the record upon Leary and Rosenstein, or Clifford Smith, because they cannot possibly, under the Federal or the State statute be parties to this action, but we have served the Circuit Court of Appeals with a copy of the agreed record left with the Clerk, and not the District Court, because the directions of this court must be to the Circuit Court. While we have mailed a copy of the record to the District Judge and to these pretended counsel, we have not done so officially, as attorneys or the petitioners, because we desire to raise this question in the very threshhold of the cause of action as presented to the Supreme Court of the United States, and this is the preliminary question which we desire to raise, that they could not appear in the District Court, and therefore, being in default, as provided by Rule 5, they are not entitled to service on the petition for certiorari.

NOTE: Atty. General Served.

Mr. Geo. E. Whitman joins in this brief, representing other assignees, as well as assignors of taxes illegally collected by the Commonwealth to the extent of approximately $147,000.00. These taxes have, by virtue of previous decisions of the Court of Appeals of Kentucky and of the Supreme Court of the United States, been held to be void, and on the trial of the merits, we will present the authorities and the facts herein showing their invalidity, and the efforts to evade this collection by a sharp political organization. By the established doctrine in Kentucky—all of these taxes may be collected in one suit—one for all.

After July 1st, 1938 no pleading could be filed, default was continuous of plaintiff.

BRIEF FOR GEORGE S. HOUSTON, and HARGIS LANGDON, TRUSTEES, and MORRIS WHOLESALE LIQUOR DISTRIBUTING CO., INC., by HARVEY H. SMITH, THEIR SAID ATTORNEY, and by HARVEY H. SMITH, ATTORNEY IN FACT of the MORRIS WHOLESALE LIQUOR DISTRIBUTING CO., INC.

We herewith adopt the statement as made in the allegations in the Petition for Certiorari, for the purpose of giving a history of the case.

That on or about the 4th day of March 1940, the Honorable Respondent, Mac Swinford, the regular Judge of the United States District Court for the Eastern District of Kentucky, sitting in the trial of this cause, then pending in said district, entered an order in Cynthiana, Kentucky, not a place designated to hold Court, dismissing the counterclaim and cross-petition herein filed, with petitioners'

answer, in this cause, over the objection of its regular attorney, Harvey H. Smith, and who had not been deposed as such attorney, and who held a power of attorney in addition to his regular employment to do and perform certain things, which by agreement Morris Wholesale Liquor Distributing Co., Inc., agreed to, and the order of the respondent, Mac Swinford, was made in said court without notice to the said Harvey H. Smith, or said corporation, and without a proper hearing, as provided.

Illegal motion made by Ed. Morris — That thereafter your petitioners applied to the said United States District Court and demanded a full hearing according to law, and the opportunity of introducing testimony so as to determine the said motion made by Edward Morris, a stockholder and officer in said corporation, about which matters the court was entirely without jurisdiction. That at a later time, on or about the 29th day of April, 1940, the said court entered an order in said case, settling the issues and controversies therein, as he supposed, and against the interests of your petitioners, without a hearing, as the judge of said court, it being contended by the court at said time that Edward Morris had the right to make a motion to discharge the corporation attorney and dismiss said cross-petition outside of the manner provided by law ,and without factual or legal authority so to do, Kentucky law nullifying such motion as made, and U. S. decisions.

Thereafter, your petitioners filed their application in the Circuit Court of Appeals for the Sixth Circuit, praying said court that a mandamus be issued to the said Honorable Mac Swinford, directing

him, as the presiding Judge of said ccurt, to enter an order revoking said order of dismissal, and to grant the motion of your petitioners to make all the parties to the agreement, hereinafter alleged, parties plaintiff with the Morris Wholesale Liquor Distributing Co., Inc. That thereafter, the said Mac Swinford, Judge of said court, refused or failed, your petitioners are not able to determine which, to permit the filing of a notice of appeal to the United States Circuit Court of Appeals for the Sixth Circuit, which notice of appeal is legally necessary, and at the same time, they prayed the allowance of an appeal to said court from said order of March 4th, entered prior thereto, the said Respondent Mac Swinford refusing to allow said appeal because Harvey H. Smith was not attorney of record. That thereupon, your petitioners prayed the Honorable Circuit Court of Appeals for the Sixth Circuit to enter an order allowing mandamus against orders of the said Honorable Mac Swinford, as Judge of said court, and as the court, some of which orders were void, because not made by the court, but were made outside of the court, never entered by the Court, but at Cynthiana.

That the final order of the Judge, which was entered on March 4th, was entered without legal notice to Harvey H. Smith, attorney for Morris Wholesale Liquor Distributing Co., Inc., on hearing and the said Honorable Mac Swinford affirmed the agreement entered into between Edward Morris and James W. Martin and H. Clyde Reeves, the said Martin being the resigned officer, as Internal Revenue Commissioner of Kentucky, which resignation took effect from the 1st day of July, 1939. The said H. Clyde Reeves was his sucessor in office, but had

never qualified as by law provided, as Martin's successor as revived plaintiff on his relation as such officer to the Commonwealth of Kentucky in this cause; and at all times there was no plaintiff thereafter. Nor had the court jurisdiction because the Franklin Circuit Court had none, prior and Martin never had such anthority.

That the Honorable Circuit Court of Appeals refused to make any findings in the cause although motion was filed in the application for mandamus, and the motion to allow an appeal was refused by the said District Court, with no reasons or no findings in the case. That your petitioners therefore have no adequate remedy as they understand the rules of this court except to apply to the Supreme Court of the United States with directions through and by a writ of certiorari to the Sixth Circuit Court of Appeals in the first instance, to make findings or to adopt the findings from your petitioners or refuse to make such findings by proper orders of the court, and to make a finding in respect to their said refusal to grant your petitioners an appeal from the said orders of the said Honorable Mac Swinford. That the order of March 4, 1940, made by the said Honorable Mac Swinford, in the opinion of your petitioners, was not a final order such as they might appeal from, and the order made on March 4th, 1940, settling said cause of action involving more than $100,000, and which was made without the consent of your petitioners, without their knowledge, and without any authority upon the part of the Morris Wholesale Liquor Distributing Co., Inc., by Ed Morris, and without any jurisdiction in said court to

affirm or adopt said agreement as a judgment of the court.

That the pretended order of the court, which was the order of the Judge, was made in Cynthiana, on March 4, 1940. This order could not be made outside of the place designated by law to hold the court, and this alone, if there was no other reason, would invalidate it. This order reads as follows:

> "The defendant, Morris Wholesale Liquor Distributing Co., Inc., having appeared in open court through its Secretary, Edward Morris, and having advised the court that it does not desire to prosecute the counter-claim, cross petition and set off heretofore filed herein against the Commonwealth of Kentucky, et al, and having moved the court to dismiss its counter-claim, set off and cross petition, and the court being advised and having considered the same, it is ordered and adjudged that the counter-claim, cross-petition and set off heretofore filed herein against the Commonwealth of Kentucky, James W. Martin, Commissioner of Revenue, et al, be and the same is hereby ordered dismissed, with prejudice, at the cost of the defendant."

This order was made by the court without a hearing and made over the motion filed for a hearing by the Morris Wholesale Liquor Distributing Co., Inc., through Harvey H. Smith, with power of attorney, and for undisclosed parties in interest. A wire was sent to the court at the filing of the motion; and refusal to hear objections and produce evidence was a denial of the constitutional rights of your petitioners. Amendment 14 to the Constitution of the United States.

At the time this motion was made for a hearing, your petitioners had theretofore filed motion to dismiss, which had been denied. See Rule 81—(C) Controlling default. These motions were directed at the right of the plaintiff, Martin, to prosecute the action, and his standing default. Martin had then resigned, and under Section 780 U. S. C. A., and under Sections 501 to 511 of the Kentucky Code, Martin had no jurisdiction to prosecute the action, and the action ceased by operation of law. Without quoting these sections of the statute, or the Code, it will only be necessary to call the court's attention to the fact that the petitioning parties or plaintiffs in the cross-petition, had the right to proceed with the action because a cross-petition had been filed on December 11, 1939, to recover taxes and certain other expenses allowable by law.

Sections 20, 21, 22, 25, of the Kentucky Code provide that the right of the plaintiff or plaintiffs, or of any party wherein their rights have been assigned, the action may be continued in the name of the assignor, or the court may allow the person to whom the transfer or assignment is made to be substituted in the action. A petition was filed or rather presented, to the Clerk on the 14th day of February, 1940, by Langdon and Houston, and a motion made at said time that they be made parties to the action. These papers were held by the Clerk for a reason given by him that was not a legal reason. Under such circumstances, the transfer of right to choose in action was made during the pendency of an action; if the opposite party is notified of the transfer, and if any settlement is made between the litigating

parties and the adverse actual parties, a judgment of the court upon such an agreement is void.

Fordson Coal Co. vs. Jackson 7 (2) Fed. 117.

It will be seen, and it can be shown that a letter was addressed to J. J. Leary and to H. Clyde Reeves, then Internal Revenue Commissioner of the State of Kentucky. No settlement should be made under the circumstances of the pending action. Acknowledgement was received from the Internal Revenue Commissioner, but none from Leary. This was not important because Leary was not a legal attorney, nor a party to the action, but Reeves become liable for money accrued.

The judgment of April 29, shown in this record at page ——, and a petition at page 79, was confirmed by the Judge and H. Clyde Reeves as a party, as the Judge claimed he was. The judgment so entered under Section 25 of the Kentucky Code is void. And in Fordson Coal Co. vs. Jackson 7 (2) Fed. 117, Asher 249 Ky., Supra.

The motion dismissing the action on the 4th day of March, 1940, had no legal movant, as Edward Morris was not a party to the action, and even if he had the legal authority to represent the corporation the corporation could not make the motion, nor could any attorney make the motion, for the reason that under Section 571 of the Kentucky statutes, a corporation dissolved, as the court found it was dissolved, could not dismiss an action, nor could it make a motion, nor could it file a suit, nor could it file an answer, because, if there had been a hearing, as

demanded by Harvey H. Smith, it would have been proven, as a matter of law, on the Secretary of State's certification, that the corporation was not qualified to sue or defend a suit. The denial of this proof was a denial of the constitutional right of your petitioners. This matter was presented to the Circuit Court of Appeals and the Circuit Court of Appeals was asked, by motion, to make findings, and on the 15th day of May, 1940, refused a writ of mandamus. The judgment of the court being void on April 29, and on March 4, no appeal would lie to the Circuit Court of Appeals, and hence a mandamus was the proper remedy. The District Court had possession of the res, and in such a case, the right of the participating party in interest was absolute, and the trial court was without discretion to refuse the petition.

Swift vs. Black Panther Oil 244 Fed. 20.

In this cause, it will be shown, should the facts be presented, that 20 days after the first day of June, when the transcript was filed in the United States District Court for the Eastern District of Kentucky, the plaintiffs were in default, because it was their duty, when a motion was filed, to quash the service, and dismiss plaintiff's petition and dissolve the attachment to make reply to this motion. This motion was filed on August 29, and no objection made to its filing. The next day after it was filed, a motion to remand was filed, which was entirely out of time, and this motion was objected to by Morris Wholesale Liquor Distributing Co., Inc. A motion to remand must be seasonably filed, and this means that it should have been filed 21 days after the first day of

June, but it was not filed until approximately *three months* after filing the transcript. The court simply paid no attention to the rules of practice. Rule 81 C.

On January 25, 1939, a second motion was tendered on the ground that there was no service properly had, and that the petition did not state a cause of action.

The Court of Appeals of Kentucky has held that such a petition, which was brought by Clifford Smith and J. J. Leary, must set up their employment and prove as a fact that they had authority to appear in the case. Otherwise it would be implied by the Court from Section 112-5 that the Attorney General must appear.

Furthermore, the Acts of 1934 and 1936 both required the Auditor to bring this action. Sec. 10 page 35 petition.—Also 145—Stat.

The Court of Appeals has frequently decided that where a remedy is provided in an action, that remedy alone must be pursued. The Commonwealth was suing for the collection of taxes under the Act of 1936, and the Act of 1934, continued over, as they contended, under the Act of March 17, 1938.

Therefore, when they sought to collect these taxes, it was the duty of the Attorney General to bring the action, and the duty of the Attorney General to sue in the name of the Auditor.

NO FINDINGS

REFUSAL OF DISTRICT COURT AND CIRCUIT COURT, ARBITRARY DISPOSITION OF CASE: DENIAL OF EQUAL PROTECTION AND DUE PROCESS; 14th Amendment.

Motion for findings, and findings were proposed to both the District Court and Circuit Court after plain showing to the Circuit Court, that no fair trial or hearing could be had before the DISTRICT JUDGE, and that there could be no appeal from void judgment.

> "Special findings requested which raise legal propositions require ruling of the Court, and reversal follows such failure, either in the Circuit Court of Appeals or the District Court."
>
> Eastman Kodak Company vs. Gray 292 U. S. 337
>
> Lewellyn vs. Electric Company 275 U. S. 243
>
> Harley Co. vs. Malley 288 US 415
>
> General Motors vs. Swann 44 Fed. (2) 24
>
> Gerlach vs. C. R. & P. R. R. Co. 67 Fed. (2) 862
>
> Hawthorne vs. Bankers Life Ins. Co. 63 Fed. (2) 971 28 USCA 773
>
> Interstate Life vs. Klaber 50 Fed. (2) 154
>
> Merriam vs. Kissel 45 Fed. (2) 983
>
> American Surety vs. Cotton Co. 58 Fed. (2) 234

MANDATORY TO MAKE

Findings of FACT; must be supported by Evidence

USC 47:407

USC 15:522

USC 21:355 (h)

Rule 70-2

Humphrey vs. Helgerson 78 Fed. (2) 484

Parker vs. St. Sure 53 Fed. (2) 706

Edwards vs. Holland Banking Co. 75 Fed. (2) 706-708

Kelley vs. Central Hanover Bank, 85 Fed. (2) 61

Clark vs. Goldust Corp. 91 Fed. (2) 12

COURT COULD NOT CORRECT FINDING WITH AFTER ACQUIRED EVIDENCE.

Martin vs. Drexel Ice Cream Co. 80 Fed. (2) 768

Negative finding is insufficient.

Southwestern Bell Tel. Co. vs. San Antonio 75 Fed. (2) 880 (cited here, 295 US 754)

Separate findings must be made from conclusions of law.

Inter-state Circuit vs. US (304 US 55)

There were no findings here, as the Court will see:

The application of no other statute could be substitutted for this proceeding, Certiorari. Intention here was to nullify right of appeal.

Consequently, on September 29, the court rendered an opinion but refused to make any findings, and it is his contention that this order with-

out findings, *on the jurisdiction of the court* and the validity of the petition, was within the jurisdiction of the court, in spite of the fact that he had actually never received any evidence on the motion to quash the service in the case, or to dissolve the attachment. Therefore, on October 9, the defendants filed a motion to vacate his opinion or findings. An order was made allowing this motion to be filed. To safeguard the issue, one motion was filed with the Judge and one with the Clerk, which the record shows, and which is shown in the petition of Houston and Langdon. Drexel Case Supra.

On November 6, 1939, the court made another order refusing to vacate the findings, as he calls them, of September 29, 1939, claiming that he had made proper findings on September 29, 1939, wherein he denied all the pending motions, he says; which cannot be done without conclusions of law in any case, and if there is any evidence findings must be made by the court.

On December 11, 1939, motion was made by defendants to be allowed to file an answer. An order was made by the court, permitting the filing of the counter claim and action in cross-petition.

No reply was ever filed to this answer or counter claim, and all the facts were admitted properly pleaded in the counter claim. In this counter-claim, a demand was made for a jury to try the common law issue in the case, and also openly demanded in court, If there were any common law issues as set up in the counter claim, the jury could not be denied.

Rule 55, 7th Amendment (US).

Up to this time, there was no question concerning the Morris Wholesale Liquor Distributing Co's right to maintain the action.

Although the Morris Company had contributed money to carry out the agreement of May 15, 1938, and more than two years had elapsed, it made no effort to question the right to file the counter claim, and no evidence was ever presented to the court, as to Morris' right to file a motion. See the Record, page ——— and the petition shown at page 60. See petition page 70 for Morris motion showing he represented *only himself*.

However, this motion for intervening parties, and the motion to strike the motion of Edward Morris filed on February 9, was recited in the order of March 13, 1940, by the Judge, as being denied because he, the Judge, had rendered an order of dismissal of the counter claim on the 4th day of March, 1940. (On Ed Morris motion).

For these reasons, the court denied the motion to strike and the motion for judgment and the motion for summary judgment.

These pleadings were filed under Rule 5, which repuired the Judge to transmit them immediately to the office of the Clerk, and if filed with the clerk, "they must show service before filing or within a reasonable time thereafter." The clerk gave the excuse, if the facts had been determined, that he has the right to refuse the filing without service. But the court, on March 13, gave no such reason. He denied them because he had already entered a motion dismissing the counter claim.

Mr. Thomson makes an affidavit concerning the motion to strike and the motion for parties, as having been presented to the clerk on February 14, 1940. See Rule 77 *Controlling Clerk.*

But the same rule provides that no service need be made on the parties in default.

An examination of the petition of the plaintiffs in the Record, page 66, will plainly show that the plaintiff was not only in default, but was not even a party to the action, and the attorneys had no right to appear.

So that we summarize the foregoing by simply saying that the petition of the plaintiffs never stated a cause of action because it did not allege, among other things, that Clifford Smith had the right to bring this action in the name of James W. Martin.

When James W. Martin resigned from office, as shown by the defendants' motion, it was necessary then, under the Federal statute, and under the state statute, to revive the action. No other step could be taken. See notice to Court Record page —.

The filing of these motions and papers, disallowed, and no record having been made of them, we must rely upon our office file. The motion for leave to file a petition was attached to the intervention petition and the motion to strike, and the motion to strike was admittedly presented on the 14th day of February, 1940. And to this motion to strike was a motion for leave to file petition. The intervention petition was presented, but withdrawn and held until the motion to strike and the motion for leave to file were acted upon by the court.

The motion to strike and the motion for leave to file petition were never denied until the 13th day of March, 1940 although presented with the motion to strike on the 14th day of February, according to the affidavit of Mr. Thomson, record, page 53, Petition.

Clifford Smith Appeared — Not an Attorney under the law.

Clifford Smith appeared merely by some agreement with the Internal Revenue Commissioner, but the statute 112-5, nor the Constitution had been repealed. No emergency existed.

Commonwealth vs. Roberta Coal Co., 186 Ky. 409

Commonwealth vs. Louisville Property Co., 128 Ky. 790

Auditor must be a party—(Oliver) Louisville Realty Co., 156 Ky., 628. Sec. 145-159, Ky. Stat.

The settlement and judgment of April 29th, 1940, was of course void under both Federal and state laws, Code and Statutes. Rule 25 and section 780, Federal U. S. C. A., Title 28.

Kentucky Code 501 to 511. "If not revived cause will be stricken."

The judgment adjudicates claims against Martin when he was not a party, and Reeves when he was not a party, with attorneys acting who could not act. *We challenge the Respondents to show how Reeves got to be a party.*

It is like Ed Morris appearing as counsel for a corporation. See Rule 43 as to evidence.

How could the corporation appear on April 29th, when the court found, and the finding was the basis of a judgment dismissing counter claim by the corporation, March 4th, prior thereto.

"Corporation had finally been dissolved."
Sec. 571 Stat.

and Board of Directors, which is produced more than a month after judgment, not certified as required by law.

It will show the utter nonsense of attempting to practice a case by ordinary methods when the court and counsel totally ignore the rules and the law of both States and United States. This is similar to receiving the motion to strike, of defendants, the motion of Ed Morris, retaining it until a month later, and then in the meantime rendering a judgment on the motion filed by layman Morris. But the very brilliant episode is, when finding Morris must furnish proof, making in the open court order telling him that authority must be brought in—a resolution of a "dissolved" corporation by its defunct President

The motion of the defendants to strike, filed February 14th, meets this fate. It was on April 1st, 1940:

> "The motion to strike cannot be filed as a part of this record, and it is so ordered and adjudged, to all of which H. H. Smith objects and excepts.
>
> Mac Swinford".

See motion; Record page 3-6.

And then later the motion to strike, for summary judgment, and motion to dismiss, were all slaughtered for this reason.

"Motion to strike, motion for summary judgment, motion to dismiss because the court had entered an order March 4th, dismissing counter claim."

In other words, you may be an attorney, and except to a ruling, and if a counter claim is dismissed, that's the end of your legal career in that case, and if your corporation has an ubiquitous Secretary, he may appear as counsellor extraordinary after hearing, and without consent of counsel, and with no evidence — brilliant strategy we allow: if the court approves, *by parties not in the case, and by counsel not in the case.*

"If revivor is not made within time prescribed by Code, counsel and parties disappear by operation of law."

Sackett vs. Grinstead, 176 Ky. 91.
Kentucky Code 501 to 511
Asher vs. Fordson Coal, 249 Ky. 487
Fordson vs. Jackson 7 Fed. (2) 117.

THE EVIDENCE RECEIVED BY THE COURT AFTER JUDGMENT

The judgment of dismissal, which is called a judgment by the court, was presented to the Judge by Rosenstein, an attorney foreign to the case, signed at Cynthiana, a place where court may not be held, proves conclusively that the court made no findings, as above shown. Drexel Case Supra.

EXHIBIT A — March 4, 1940

"The defendant, Morris Wholesale Liquor Distributing Co., having appeared in open court through its Secretary, Edward Morris, and having advised the court that it does not desire to

prosecute the counter-claim, cross-petition and set off heretofore filed herein against the Commonwealth of Kentucky, et al, and having moved the court to dismiss its counter-claim, set off and cross-petition, and the court being advised and having considered the same, it is ordered and adjudged that the counter-claim, cross-petition and set off heretofore filed herein against the Commonwealth of Kentucky, James W. Martin, Commissioner of Revenue, H. Clyde Reeves, Commissioner of Revenue, et al, be and the same is hereby ordered dismissed, with prejudice, at the cost of the Defendant."

The only way petitioners would have of proving this order was made at Cynthiana would be to have a hearing as demanded, and show it by the court's letter and the Clerk's letter to Harvey H. Smith.

This would have come up on the motion to strike, which was pending from and after the 14th of February. We quote from the affidavit of Anthony Thomson at page 53, of applicant's petition:

"That on the 13th of February, 1940, he received from Judge Harvey H. Smith a motion to strike the motion of Edward Morris to dismiss the counter claim and answer heretofore filed in the case of J. W. Martin, et al, plaintiffs, vs. Morris Wholesale Liquor Distributing Company, Inc., defendants, which was then pending in the Eastern District of Kentucky at Catlettsburg. That said affiant took said motion (and this motion for parties) to the United States Clerk at Lexington, where he had received the same and did offer to file with said Clerk the motion above mentioned. That under rule 5-A of the New Rules of Civil Procedure, the Clerk refused to accept and file said motion until copies had been delivered counsel for the other parties or notice of the filing accepted by respective coun-

sel for litigants." Rule 5—"Service by mailing is complete." Leaving it with Clerk of the Court."

In the first place, these gentlemen were not counsel in the case. In the second place, the rules provide that no pleadings need be served on a party in default. In the third place, the rules provide that service may be had "in a reasonable time after filing," if rules 4 and 5 are read. The motion presented at the same time is Exhibit B, which reads:

> "Comes now the Morris Wholesale Liquor Distributing Co., Inc., a corporation, by Harvey H. Smith, its counsel, and moves the Court to allow the filing of the intervention petition of George S. Houston, Blue Grass Liquor Company, Inc., Hargis Langdon, et al.
>
> The grounds of this petition are that they are actual parties, to the controversy now between the Commonwealth of Kentucky, on relation of James W. Martin, and that it is necessary to protect their interests herein, in view of the conduct of Edward Morris an officer and stockholder in the Morris Wholesale Liquor Distributing Co., Inc.
>
> Respectfully submitted,
>
> Harvey H. Smith, Attorney for Geo. S. Houston,
>
> Hargis Langdon, Harvey H. Smith, et al."

The Court then, on April 9, 1940, made the ruling found at page 52 of the petition.

> "Motion to Strike, the motion of Edward Morris to dismiss the Counter-Claim and answer heretofore filed in the above entitled cause, motion for judgment, motion for summary judgment, this cause having been by order of the court dismissed on the 4th day of March, 1940, it is ordered that the motion to file motion to

strike, motion for judgment, and motion for summary judgment, is hereby overruled.

Signed: Mac Swinford, Judge.

Certified: A. B. Rouse, Clerk, March 13, 1940."

Served and Filed Feb. 14, *Under Rule* 5.

The remarkable motion of Edward Morris is recited by the court in his order at page 56, of petition on which he founded this order at Cynthiana:

> "The *request* was made by the said Edward Edward Morris in the form of a motion that the court dismiss the answer and counter claim filed herein as of December 11, 1939."
>
> *Not sworn to — Not filed by corporation.*

Now, of course, Edward Morris could make no such motion. He is not an attorney and the corporation had assigned its rights to trustees, as they might accrue in said cause, and furthermore, the corporation could file no such motion because it had failed to appoint a service agent as required by law, and the Court of Appeals in the Oliver vs. City of Louisville 161 S. W. 570 Case; and Druin vs. Chatterson, 143 S. W. 6, recited herein, held that it could neither answer or plead in a cause under such circumstances, nor could the court have any jurisdiction to grant relief. (Sec. 571, Ky. Stat)

The court denied the motion for findings filed in this case upon the sole ground that there was no evidence and because H. H. Smith was not attorney.

In proof of the fact that the court did receive evidence after the judgment or order of March 4, we recite Exhibit F:

"This day came James W. Chapman, attorney for the Morris Wholesale Liquor Distributing Co., Inc., and in compliance with the order heretofore entered in the above styled case offered for filing a Resolution signed by Irving Olin, Chairman of the Board of the Morris Wholesale Liquor Distributing Company, approving the action of Eddie Morris, Secretary-Treasurer of the Company, in dismissing the answer and counter-claim of the Company heretofore filed in this action, and agreeing to the entry of the agreed judgment in the above styled action, the resolution being sworn to by Irving Olin before Samuel Morris, Notary Public, Boyd County, Kentucky, the Court being advised, it is ordered that the Resolution be, and it is now filed and noted of record. (41 days after Judgment).

MAC SWINFORD, Judge.

Certified: A. B. Rouse, Clerk."

This is evidence, April 15, 1940.

NO EVIDENCE RULE 43

Thus there were findings, but based on what? Where is there in this case a *first affirmation?* Where did he get the evidence to make a finding of fact, that H. H. Smith did not represent the corporation?

EVIDENCE MUST BE SWORN TO IN KENTUCKY (Ky. Code) Rule 43 (US)

Mr. Smith, Feb. 9th, 1940: "I demand this witness be sworn." The court refused.

"Any motion disputed must be sworn to or the court will strike it."

Oral objection was made to appearance of attorneys at the same time.

Clifton vs. Toombs, 21 Fed. (2) 698, the Sixth Circuit, decided that this is a power statute and the court has no right to hear challenged counsel except in defense of their right to appear. Their petition must state their right to appear, since they do not sign as Attorney General, which is notice to the world, they have no right to represent the state. The District Court refused to rule, and the Circuit Court of Appeals refused to make findings.

Such is the law of Kentucky.

Your petitioners were vigilant in calling the court's attention to what were their legal rights. They filed a supplemental petition, to which was annexed exhibits, while the court was attempting to act during the pendency in the mandamus in the Circuit Court of Appeals, which, if not illegal, is very unethical. We quote this petition filed April 8, 1940, in the *Circuit Court of Appeals for the Sixth Circuit*: See Rule 5 (C).

"TO THE HONORABLE JUSTICES OF THE CIRCUIT COURT OF APPEALS:

Filed April 8, 1940, John W. Menzies, Clerk of Circuit Court of Appeals.

Since the filing of the previous petitions for the Writ of Mandamus the Honorable Respondent called a Special Court in the City of Covington, Kentucky, and there permitted, J. W. Chapman, alleged Attorney for the Morris Wholesale Liquor Distributing Company, and after the Judgment of March 4th, 1940, dismissing the counter-claim, and he was asked to state in open court whether he authorized Edward Morris to use his name as Attorney, and he was authorized

to furnish the Court a resolution of the Corporation, authorizing his employment, and the discharge of Harvey H. Smith. Harvey H. Smith objected to his making a statement, and objected to presenting a resolution after judgment had been rendered in the case, and after refusal by the Court to Harvey H. Smith to examine both Morris and Chapman, in respect to what was done and because no copy of the resolution was served on Harvey H. Smith, and no witnesses sworn, and no oportunity given Harvey H. Smith to cross-examine the witnesses; and because the petition to substitute interested parties had been refused by the Court of filing, and because said action of the court was without jurisdiction, and prejudicial to such petitioning parties and Harvey H. Smith, having no chance to cross-examine the witnesses, all of which action denied to Harvey H. Smith and said petitioners due process of Law, contrary to the 14th Amendment of the Constitution of the United States. The said Court having been called April 1st, 1940, 7:30 P. M.

Respectfully submitted,

HARVEY H. SMITH,

Counsel."

Motion for leave to file intervention petition is as follows: See Rule 5 (C) Matter of Right.

"Come the Morris Wholesale Liquor Distributing Company, Inc., a corporation, by Harey H. Smith, its counsel, and move the court to to allow the filing of an intervention petition of George S. Houston, Blue Grass Liquor Co., Inc., Hargis Langdon, et al. The grounds of this petition are that they are actual parties to the controversy now between the Commonwealth of Kentucky, on relation of James W. Martin, and that it is necessary to protect their interests here in view of the conduct of Edward Morris,

an officer and stockholder in the Morris Wholesale Liquor Distributing Co., Inc.

Respectfully submitted,

HARVEY H. SMITH, GEORGE S. HOUSTON,
HARGIS LANGDON, ET AL."

The intervention petition and petition for substitution of parties-trustees, under the Code in Kentucky and the Federal Rules, is entitled: "Intervention petition of George S. Houston, Blue Grass Liquor Co., Inc., Hargis Langdon, et al." This petition was presented to Anthony Thomson on the 13th, as certified in his sworn affidavit. This petition and the motion were both over-ruled by the court, March 13, after he had rendered judgment dismissing the counter clain. A summons must be issued under (C) Rule and Kentucky Code 20 to 25.

The motion to strike, which precipitated the entire jurisdiction of the court, and the right of Edward Morris to file the motion, was presented and received by the Clerk on the 14th of Febraury, 1940, prior to any judgment. The Clerk's contention was that it had to be served before it could be filed, but a reading of Rule 5 will show that it may be "served at any reasonable time thereafter." As a matter fact, it had been served on February 2nd, by Frank M. Dailey, on counsel for James W. Martin. We merely recite the caption: See Rule 19.23.

"Come now defendant, Morris Wholesale Liquor Distributing Co., Inc., by Harvey H. Smith, and moves to strike the recorded judgment dismissing the counter-claim of the Morris Wholesale Liquor Distributing Co., Inc., and as grounds therefore allege:

SUMMARY

a. That the order could only be entered in open court and was entered at Cynthiana.

b. That the order was entered without evidence or without findings, and entered by the Judge and not by the Court. That the order was based upon the motion of Edward Morris, a stranger to the record.

c. That Edward Morris was not sworn according to the laws of Kentucky, and could not be permitted to testify in open court without being sworn. That the denial on the demand of Harvey H. Smith to swear said Morris and hold a hearing was a denial of the constitutional rights to show the court that Morris had no authority.

d. That the Morris Company could not dismiss this action without the consent of Harvey H. Smith, et al.

e. That on the admission of the court that there is no evidence, no judgment or order could be entered. That when said order was filed, there was pending a motion for judgment presented to the court and a motion for summary judgment. These motions were filed on February 3 and February 13, prior to the entry of the order of March 4, and must be determined before that order could be entered. That the associates of the Morris Company, as parties in interest, had the absolute right to file their petition of intervention as soon as they learned the Morris Company, or Edward Morris, had attempted to violate the contract of May 15, 1938. That the pro confesso judgment was presented to the Clerk on January 22, but was not filed until February 9th. That this judgment must be granted in view of the default of plaintiffs. That James W. Martin had no capacity to file any pleading in the case."

THE FINDINGS Rule 52

The findings were overruled by the court or denied filing on March 13th, 1940. That there are 27 grounds of these findings, among which are that Leary and Rosenstein represented no party in this action. That they are not members of the Attorney General's staff, and that the Attorney General alone could bring and defend this action. That under Section 780 of the U. S. C. A., Code of the United States, James W. Martin and said attorneys had ceased to be parties in the action. (Ky. Code 501 to 511).

That the conclusions of law, in said findings, of the number of 10, were refused filing by the court.

SUMMARY

That the Morris Company was entitled to judgment on its motions. That the motion to dismiss attachment must be sustained. That the Franklin Circuit Court, where the suit originated, had no jurisdiction. The United States District Court had never determined its jurisdiction. That the attorneys, Leary and Rosenstein, were barred from participating in the cause. That James W. Martin had ceased to be a party on his resignation from office July 1st. That Reeves, his successor, had never qualified as a party according to the United States Code, and the Code of Kentucky. That the taxes were invalid which were sued out and that the Acts under which they were sued required the Auditor to bring the action. That the Acts of 1934, 1936, and 1938 were void and, as they were attempted to be imposed, denied your petitioners their rights under the 14th Amendment and under Amendements 4, 5 and 7 of the Constitution of the United States.

That the order of the said Mac Swinford, on April 1st, 1940, as made thereafter, denying the motion to strike, should have been ruled upon and filed on February 14, 1940. That the court had no jurisdiction to make any order whatsoever after default of the parties or after the resignation of James W. Martin. Summary Judgment therefore was good February 9th, 1940. Rule 56 (C).

That the Acts complained of and which burden your petitioners in the collection of import taxes and consumers' taxes were all unconstitutional and imposed a burden without law on your petitioners.

a. Kentucky Alcohol Control Act, and Whiskey Tax Law, of the State of Kentucky, effective March 17, 1934.

b. The Kentucky Whiskey Tax Act of April 30, 1936.

c. Alcoholic Beverage Control Law of 1938, contains 27 sections which the Court of Appeals of Kentucky, had decided theretofore, were unconstitutional upon one ground and another. That without these provisions the Act would be unenforceable and therefore the entire act is ununconstitutional — all acts.

That each of said Acts violate Article 1, Section 8, of the Constitution of the United States. That each of said Acts violate Amendment 7 and 4 and 5 of the Constitution of the United States and Amendment 14 of the Constitution of the United States. That each of said acts violate the Interstate Commerce Act known as the Carmack Amendment, The Repeal and Enforcement Act of August 27, 1935, and the Bill of Lading Act, enacted in 1916, as amended in 1930, the Motor Carrier Act of 1935, enacted by the

Congress of the United States. That these acts, as they were enforced against your petitioners, deprived them of their property without due process, denied equal protection and impaired their contract. A full and complete argument on these issues will be presented by a special brief, when this court shall determine the questions which we think will dispose of the case without their consideration.

On April 1st, 1940, the Court made his second order, concerning the motion to strike in words as follows:

> "The Clerk is directed to make the motion to strike tendered but not filed, and placed with the record.
>
> Signed: MAC SWINFORD, Judge
>
> April 1, 1940
>
> Certified:
>
> Signed: A. B. ROUSE, Clerk".

See Rule 77 (A, B, C) The Judge seemed to fear the motion—he struck at it three times.

Thereafter, H. H. Smith filed motion for permit to file bill of exceptions. This was denied by the court, although a bill of exceptions was not presented with the motion. He also attached to this motion authorities in 31 states showing that inasmuch as Morris was not authorized by the corporation, and there was no testimony to support the Morris motion, and it was not sworn to, and that Morris had stated he was insolvent, and had been dissolved, that the action must be continued in the name of the Morris Company to secure the fees of Harvey H. Smith. Under the case of Erie R. R. vs. Thompson, 304 U. S.,

the laws of Kentucky were binding on this court at this time, in respect to attorneys' fees.

We pursue the record here no further except to say, that if the court desires to examine the entire record and finds it necessary to sustain the petition for the writ, we will present such records as are necessary, but in our view of the case, the judgment of the court on March 4th, 1940, was void, for it is conceded that J. W. Martin resigned his office July 1st, 1939, and it is conceded by the record recited in the petition that the Commonwealth of Kentucky and J. W. Martin were always in default, and it will be conceded that Leary, Clifford Smith, and Rosenstein are not attorney generals of Kentucky; and it is the law of this court, and the Sixth Circuit, and the Commonwealth of Kentucky, that no attorney can appear in a case and make motions when his client is demitted from the case by operation of law, Kentucky Code 501 to 511. The judgment of April 29th, entered at Lexington, Kentucky, and not at Catlettsburg, Kentucky, was a void judgment for the many reasons cited in this brief. First, because there were no parties plaintiff; second, H. H. Smith was still attorney for the Morris Wholesale Liquor Distributing Co., Inc., and had never been demitted in the case by order of the court, and that the attorneys who appeared could not appear. That Reeves had never been made a party successor to J. W. Martin, and J. W. Martin had been out of office for more than six month at that time. That where a settlement is made when intervening parties have been denied appearance in the case, judgment is void

under the Kentucky Code, 501 to 511, and under the Code of the United States, U. S. C. A., Sec. 780, Rule 25.

Roberts vs. Lowe — 236 Fed. 604.

That where the judgment of the court is based upon evidence received by the court after the entry of the order of March 4th, 1940, the judgment is void. That a judgment in a pending action in which there are common law issues, must be tried in the district, designated by the statutes, which is Catlettsburg, Kentucky. That where a corporation has failed to designate its service agent under the Kentucky statute, as decided in the Oliver case, Supra, the judgment is void. The judgment is void upon other grounds not necessary to present here.

If the petition for Certiorari by any chance is denied, this court could make some proper order vacating the judgments herein referred to, and in this order designate a re-trial, and suggest that a judge from out of the district should be brought in to try the cause, on a proper petition filed by Harvey H. Smith, George S. Houston, Hargis Langdon and Morris Wholesale Liquor Distributing Co., Inc., by H. H. Smith.

Respectfully submitted,

HARVEY H. SMITH,

GEORGE E. WHITMAN.

SPECIAL BRIEF OF HARVEY H. SMITH, FOR HIMSELF, RESTATING HIS POSITION.

(1) Harvey H. Smith had been employed to defend the criminal action of seizure of sixty cases, shipped in inter-state commerce by the Morris Wholesale Liquor Distributing Company, Incorporated, on March 24, 1924. He defended a civil action and a criminal action prior to May 15, 1938. A proceeding being filed about this time to cancel the permit of the corporation as wholesaler, he also defended that action.

On or about May 15, 1938, contract was entered into between the Morris Wholesale Liquor Distributing Company, Incorporated, and numerous other wholesalers and rectifiers to collect from the Commonwealth of Kentucky certain import taxes, and consumers taxes. A contract was entered into, whereby the interest of each of these parties was assigned to two trustees, Hargis Langdon and George S. Houston, which assignments included the interests of the Morris Wholesale Liquor Distributing Company, Incorporated, and it was agreed that the action should be prosecuted in the name of the Morris Wholesale Liquor Distributing Company, Inc., by cross-petition. A power of attorney was executed to Harvey H. Smith by the Morris Wholesale Liquor Distributing Company, Inc., and certain other parties to carry out the terms of this agreement and money paid.

(2) Thereafter, the politicians of the Capitol of Kentucky secured possession of Ed Morris, Secretary of the Morris Wholesale Liquor Distributing Company, Inc., and promised him certain exporting rights, conditioned on the passage of a bill through the

legislature of Kentucky. This bill was passed but vetoed by the Governor of the State, but before its veto, Morris had entered into an agreement with these politicians that he would dismiss the cross-petition and counter-claim filed in this action. This agreement was proposed to Harvey H. Smith, the counsel of the Corporation, but he refused it, and insisted that if the Corporation could breach its contract, that the other interested parties would have to be substituted, or the fact made known to the Court. Thereupon Morris appeared personally in the court at Lexington, Ky. — A place other than where the action was pending.

There is but one question that needs be argued, and which, by all precedent disposes of this case.

(3) The order of this Court, clearly, must be, on the record:— Return of the *cause,* and an order to dismiss the *action* of the plaintiff, vacating all orders made after August 29, 1938, except that motion of the defendant for judgment pro-confesso on the cross petition or the Counter Claim Petition of the Morris Wholesale Liquor Distributing Company, Incorporated.

The action and order for costs of this application, proceeding in that name, for the benefit of parties who might be substituted, and parties, who, as matter of right might become parties to establish their right to participate in the judgment had against the Commonwealth, under Kentucky Code for taxes due and owing.

(4) The amount of proof necessary to show the total taxes due in this action may be taken, but no controverted question can be litigated. An order de-

mitting any interest which Ed Morris might have, and the assets disposed of by the void judgment of April 29, 1940, should be returned to the possession of the court, or their actual value; and summary judgment after proof of the services of counsel since the 29th day of August, 1938, and the order should include the substance right of a trial before a Judge out side of the district, for reasons shown by the record and for reasons that could be shown on a motion to disqualify.

(5) The questions are argued thru, but the determining question is the fact that under both Federal and Kentucky Statutes, the court had no jurisdiction to enter any order after August 29, 1938, because the action abated as to the plaintiffs on that date, and no revivor can be had now over the objection of the corporation—that corporation having assigned its interest in the subject matter of litigation, and plaintiff having abated, with their action July 1, 1939. Sub-questions are:

(6) Judgment of April 29th is void.

Order of March 4th is void.

Motion-Right of petitioners to be joined as parties plaintiff on cross-petition and counter claim should be sustained.

Judgment for costs and for assets, returned with allowed attorneys fees up to that time.

Motion filed, August 2, 1938, and Motion filed August 29, 1938, must be sustained.

Motion for judgment of December 11th, should be sustained.

Finding should be made that no proper parties or attorneys had ever appeared, so as to settle that issue of law. Default, 81-C Rule.

The attorneys fees and costs of appeal and application for mandamus in the Circuit Court of Appeals, and the defense in the District Court after default of the plaintiff, and certainly after dismissal of the plaintiff's action by operation of the law, July 1st, 1939, should be adjudicated and allowed by this Court. $1,000, for appeal, $1,000 for, appearance in the District Court and the Circuit Court of Appeals, and the costs of printing briefs.

(7) Under the Federal Statute the manner of revivorship is specified under Rule 25 which requires the service of process, and Section 780 Title 28 USC.

> "When an officer resigns or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within six months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it."

Thus it appeared that the kinds of public officers included are those of any county, city or governmental agency. Section 780 of the Statute, refers to *the present or future discharge* of official duties. The Statute applies the rule to an action, suit or other proceeding, while the Rule applies to an officer when he is a party to an action.

It is very plain, however, that the substance of the rule is the same as that of the State of Kentucky except that the time is different. It was formerly twelve months in the Federal Statute but has been reduced to six months. It has been universally held by both the Federal and Kentucky Courts that an order of substitution must be made after due notice to the party to be substituted, and to the

opposing or adverse parties to the person making the application. The action does not abate as a *cause of action* but it does abate insofar as it relates to *the pending action.*

Thomas B. Bishop Company vs. Santa Barbara County 96 F. (2) 198, 199.

In US vs. Cummings 85 F. (2) 273, it was held that if the order of substitution is not made then there is no revivorship, such is the law of Kentucky.

The statute applies to both trial and appellate courts, while the rule applies to the United State District Court.

Ex parte La Prade 289 US page 459 and 489.

Summons must be served in each case under each statute.

Barth vs. Barth 102 Ky. 56—Code 501 to 511. In that case it is said:

> "Within thirty days after service, if six months has expired, petition may be filed, but must be filed within twelve months."
> Louisville vs. US 97 SW 1096.
>
> "Unless substitution is made, the court loses jurisdiction."
>
> Asher vs. Fordson Coal Co. 249 Ky. 498
>
> The Black-Clausen vs. Robertson 71 F. (2) 536.
>
> Martin vs. Coe 83 F. (2) 606.
>
> Sackett vs. Grinstead 176 Ky. 91.
>
> Baker vs. Davis 221 Ky. 527.

In Martin case the court said:

> "No motion was made under Section 11 of

the Act of February 13, 1925, Chapter 229, 43 State-936-941, 28 USCA 780, asking the court to permit the cause of action to be continued and maintained by or against the successor in office of such officer, and that the six month period, within which such a motion could have been made had expired, the court now vacated the judgments entered in the District Court and in the Circuit Court of Appeals and remands the cause to the District Court with directions to dismiss the action or cause as abated."

An order to revive cannot be made without consent of the defendant except by petition and summons.

509 Ky. Code and 505 to 511.

Petition must be filed stating facts necessary to authorize revivor with a prayer therefor upon which summons may be issued and served.

Acts of 1894 C-72, Page, 172 (US).

Hall vs. Sipes 10, Ky. Reporter 885.
502 Kentucky Code.

If not revived by consent, the order of the court shall be served as a summons on the adverse party to the one making the motion.

Baker vs. Davis 221 Ky. 525.

Revivor is void under the Civil Code of Practice, Section 502 to 511 if not revived in the manner provided; and shall be stricken from the docket on the order of the court.

Costs shall be allowed including attorneys fees.

Hollen vs. Administrator 259 Ky. 142.

Thus it is plain that the judgment or order,

whatever it might be in this cause after July 1st, 1939 was void, unless it had been an order of the Court rendered exparte on the pro-confesso petition and motion for judgment.

NEITHER MARTIN NOR REEVES COULD APPEAR AS A PARTY IN THE CASE, AS SHOWN BY THE ABOVE AUTHORITIES.

Neither Clifford Smith nor J. J. Leary nor any other person could appear in the case as attorneys, and never at any time under 112-5 Ky. Statute.

TRUSTEES

"If the petitioning parties who were contracted with are interfered with by the decree of the court, and the contract was previously made, these parties have a right to intervene and the judgment has been presented after the intervention or substitution has been applied for, the judgment is void."

French vs. Capen 105 US Page 509.

US vs. Ladley 51 F. (2) 757

US vs. California Canaries 279 US 556

Leary vs. Administrators 224 US 567

Sections 501 to 511 Ky. Code.

And the judgment is void for want of parties. (No revivors).

Black vs Robertson Supra.

"The motion must be filed within six months, we see no escape from the conclusion that the judgment is void, and the action must be dismissed."

LeCrone vs. McAdoo 253 US 217

Clauson vs. Curran 276 US 590

Fix vs. Philadelphia Barge Co. 290 US 530.

"We therefore remand the case to the court below with directions to dismiss the bill. Remanded with directions to dismiss."

(9) ATTORNEY GENERAL MUST BE A PARTY.

Kentucky Statute 112-5.

Com. vs. Roberta Coal Co. 186 Ky. 409

McAlexander vs. Wright 3 AKM 189

Com. vs. Louisville Property Co. 128 Ky. 790

(Auditor) Louisville Realty Co. 156 Ky. 628.

The following brilliant expurgation of the mental field within legal lore is no judgment, and affects not the Commonwealth nor any other person. It is as follows:

JUDGMENT — APRIL 29th

"This judgment is to be treated as a full and complete settlement and adjustment of all claims asserted by the plaintiff against the defendant herein and of any and all claims that the defendant has asserted or may have against the plaintiff and James W. Martin, (*not a party,*) and H. Clyde Reeves." (Not a party).

MAC SWINFORD.

In the first place Martin was out, and Reeves was not in. In the second place the suit was by the Commonwealth of Kentucky on relation of Martin, and if the judgment was not in favor of the Commonwealth then there could be no judgment. If the cross-petition had been dismissed against Martin, of course the claim did not exist as against him, and

not being tried on the merits could not of course be adjudicated as an estoppel against future action.

(10) *The question of intervention is not important in view of other questions,* although this question could become important, and if the court reaches the position where it desires to examine the law, we suggest Swift vs. Black Panther Co. 244 Fed. 20, and the copious authorities cited there. This situation however is controlled by the Kentucky Code, Section 20 to 28. It is enough to say that under the terms of the contract made here on May 15, 1938, the right of substitution would control in respect to all assignments that have been made. *The supposed order dismissing H. H. Smith as attorney.* —Considered here.

(11) There never was an order made by the court dismissing H. H. Smith as attorney for the Morris Wholesale Liquor Distributing Company, Inc. This order could only be made at the hearing of testimony, and the Court refused to hear any testimony on the subject, consequently H. H. Smith was never dismissed from the suit.

Morris had no power to do so, and if the Corporation had authorized him to do so before the entry of dismissal this hearing would have precipitated the contract made by the Company and would have, when exposed, prevented any such action.

Besides, the assignment of the interests of the company to the trustees, made the corporation merely a nominal party, the denial by the court, of such a hearing, on a motion to strike his name, and the action of the court in respect to said motion would have

prevented the court where evidence was produced from doing anything other than to sustain a motion to strike.

April 1st *order of the court proves this*:

> "The defendant through the said Edward Morris stated in open Court, that the Morris Wholesale Liquor Distributing Co., Inc., was no longer an operating Company, and HAD FINALLY BEEN DISSOLVED. The request was made in the form of a motion that the court dismiss the answer and counter claim filed herein as of December 11, 1939."
>
> In Kentucky a corporation cannot act after dissolution.

If the corporation had been *dissolved, how* could it make such a motion? If it had not been dissolved how could Edward Morris make the motion, being a layman and his client, a corporation. There was no showing that Morris had any authority.

The court refused to swear him or hear any testimony, for the court says that H. H. Smith, attorney without proof, of record is no longer an attorney for the company. There is not a scintilla of proof in the record to support such a statement made by the court.

How can any court deny the appearance of an attorney until he makes a finding, based on evidence, that for some lawful reason the attorney is "fired" by the corporation. What evidence is here to show that Smith had ceased to be attorney, for the court refused to make a finding himself, and refused to state why he refused findings of Morris Wholesale Liquor Distributing Co., Inc. a dissolved corporation.

How could the court know it was *dissolved,* except by hearsay, out of the record? *He refused to allow the filing of the motion to strike.* Where is the authority in law or rules for such refusal, which would and did promptly raise the question of whether there was any authority anywhere for the Morris appearance.

(12) February 10, 1940, Harvey H. Smith filed motion for findings, under the rule, allowing three days for transporting in the mail the Clerk should have filed it the 13th of February, 1940. If so he should have presented it to the Judge, no doubt he did, and in this motion page 60-61 of the petition (Harvey H. Smith was still an attorney of record).

We quote:

MOTION AND TELEGRAM:

> "That the court set this cause down for hearing for the purpose of introducing evidence on the right and claim of Edward Morris to represent the Morris Wholesale Liquor Distributing Company, Inc., and discharge Harvey H. Smith, as attorney, and the purpose of showing collusion, etc." Record pg. ———.

Also on March 4th 10 A. M. wire to Judge.

> "Request no action in Morris case until set down for hearing." H. H. Smith.

All of this before order of dismissal.

If H. H. Smith was not attorney of record, the law gives Hargis Langdon and George S. Houston the right to file a motion or petition as intervening parties, they being citizens; expressly so, under federal and state rules.

But let us see how fair the court was:

So we have an order April 1st, 1940. We quote:

> "The motion to strike cannot be filed as a part of this record and it is so ordered and adjudged, to all of which H. H. Smith objects and excepts." Record page ———.

Then we have Mr. Thompson's affidavit, sworn to on the 21st day of February, 1940, relative to the motion to strike-as follows:

> "That on the 13th day of February, 1940, he received from Judge Harvey H. Smith a motion to strike, the motion of Edward Morris to dismiss the counter claim and answer heretofore filed etc. That said affiant took said motion to the United States Clerk at Lexington, where he had received the same, and did offer to file with said Clerk the motion above mentioned." Letter says he filed, Clerk admits he did.

So the Clerk had said motion all of this time. At this time the court had made no order, but there should have been before him a motion for a hearing and findings, and to hear evidence, unless lost in the mail. Rule 77—A, B, C.

See pages 52-53 of petition. But on March 13, 1940 the Court took another court order or judicial order, we do not know which, which was 17 days prior to the April 1st order. See Rule 5 (d-e).

> "Motion to Strike, see Page 52 of Petition, where motion to dismiss and motion for sum-

mary Judgment and motion to strike were denied because the court had entered an order March 4th dismissing counter claim."

Hear him:

"This CAUSE having been dismissed by order of the Court on March 4th, 1940." Record Page ————.

So the reason that day was different from April 1st—the April 1st reason was because H. H. Smith was no longer attorney of record, and the March 4th, 1940 order imperiled the court's jurisdiction, the judge concluded, because dismissed counter claim died.

None of these orders had force, and generally were not true, let us see if the record bears out the statement.

Motion on February 9th, for want of proper parties, was filed that day, and was before the Court. Martin had been demoted, Reeves had never been qualified, and under Rule 25, Section 780 USCA and the Code of Kentucky they were not parties.—501 to 511.

Filed and entered April 29th, 1940. Spurious Judgment, approved by the Judge.

Mr. H. Clyde Reeves, approved of the entry, Mr. Clifford Smith, (not an attorney general,) Mr. J. J. Leary, Mr. Samuel Rosenstein, but their appearance the record recites is on the relation of J. W. Martin for the Commonwealth. So the cause was still glittering in the judicial sunshine on April 29th, and was not dismissed—(This cause April 1st, Smith did appear).

(13) The court denies the Findings, in an order and letter, because there was no evidence. On Page 64 C. Pet. on April 16, before April 29, final order and

judgment, the Morris Wholesale Liquor Distributing Company, Inc., and H. H. Smith made a motion for a Bill of Exceptions to preserve the record, and George S. Houston and Hargis Langdon join, on the theory that the filing of their motion and attached petition for parties and summons, gave them the right. Motion for bill filed Page 64 of the petition.

It says:

> "Moves the court for an order to settle the Bill of Exceptions." Mailed April 16th, 1940—Over-ruled on the 17th.
>
> "This day came Harvey H. Smith and offered for filing motion to file bill of exception, and BILL OF EXCEPTIONS. Denied because Harvey H. Smith is no longer attorney of RECORD."

Thus the court makes no order striking the name of H. H. Smith but finds he has done so in substance before.

Smith, was attorney for defendant, when the petition was filed, and if the statement of the court is well founded, an exception being allowed to him, he had a right to have a BILL OF EXCEPTIONS allowed where there is any evidence, and surely, conclusions of law.

Inasmuch as he was not "fired," by the court, as he says, (the judge), then of course H. H. Smith had a right to appeal from the final judgment on April 29th, 1940, from that firing, and if there was the slightest evidence to support the court, Smith had a right to such a BILL, but he denied filing of notice of appeal. But as a matter of fact no such

Bill was presented, but a motion for one, just to test out the malignant feeling of the court, to see to what extremes he would go and he denied filing a bill of exceptions never presented.

(14) On April 15, 1940, the court allowed evidence, as shown at 54—the petition, being resolutions from the President of the DISSOLVED CORPORATION. Surely he calls these resolutions offered by Morris, without a hearing, to support a judgment, entered, March 4, 1940 evidence. He took them as facts. (After Judgment).

We pursue the matter no further except to cite the fact of record, showing no jurisdiction:

> The notice to the parties and court is found in all of the pleadings that Langdon and Houston were necessary parties as early as February 14th, the court finding they did not appear "timely enough." The law is: if the right to a transfer of a chose of action after notice is made during the pendency of an action, after notice of transfer or claim of any rightful party, and any settlement is made between the litigant party and the adverse actual parties, a judgment of the court upon such an agreement is void. 501 to 511. (Ky. Code).
>
> *This was done here.* Rule 77.

(15) THE ATTORNEYS COULD NOT APPEAR IN THIS CASE, BECAUSE THE STATUTE LIMITING THE POWER OF THE ATTORNEY GENERAL, HAS NEVER BEEN REPEALED, AND THE EMERGENCY DID NOT EXIST FOR ANY CONTRACT WITH CLIFFORD SMITH. THE CONTRACT WAS NOT RECORDED AS THE LAW REQUIRES, AND NO CERTIFICATION WAS GIVEN

BY THE ATTORNEY GENERAL OR THE INTERNAL REVENUE DEPARTMENT, AND IN ANY EVENT SUCH CERTIFICATION CAN ONLY COME *ABOUT IN A SINGLE CASE.* SMITH HAS APPEARED IN AT LEAST ONE HUNDRED CASES IN THE LAST FOUR YEARS.

The Court of Appeals in Columbia Trust Co. 162 Ky. 827, held that the resignation of a public official ceased and determined the action in which he was a party, on the state's relation. Not only was this, plain of record, but notice was served on J. J. Leary and H. Clyde Reeves who had been injected into the case in some unknown manner not made public.

> The judgment shows that, "it is ordered and adjudged by and on relation of J. W. Martin the parties having agreed to a settlement." April 29, 1940.

We know, no such judgment had any such validity as claimed, and a Mandamus by the Circuit Court should have been issued because no appeal was made or could be made, but Petitioners, asked in a MOTION for findings to make such reasons clear for their refusal of a Mandamus, and the Court refused or made no response.

THE JUDGMENT OF MARCH 4th, 1940 was void; and the judgment of April 29th, also void, so the action stands on the docket Exparte, from and after July 1, 1939, and very certainly from and after the 29th day of August, 1938, owing to default.

SIXTH CIRCUIT COURT OF APPEALS

(16) In Asher vs. Ford Coal Co. 249 Ky. 699, the Court of Appeals of Kentucky settled every ques-